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IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1969

No. [redacted] 140

CHRISTOPHER JACKMAN, *et al.*,

—v.—

JOHN M. BODINE, *et al.*

THE ELIZABETH DAILY JOURNAL, *et al.*,

—v.—

ROBERT J. BURKHARDT, *et al.*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW JERSEY

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Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of New Jersey entered on April 22, 1969.

Opinions Below

The opinion of the Supreme Court of the State of New Jersey is set forth in the Appendix, *infra*. It is the fourth of a series of opinions by the New Jersey Supreme Court since 1964 in *Jackman, et al.* v. *Bodine, et al.* The first decision is reported at 43 N. J. 453; the second at 49 N. J. 406; the third at 50 N. J. 127.

On May 7, 1969, the Supreme Court of New Jersey denied an application for a stay of the June 3, 1969 Primary Election.

Jurisdiction

The decision of the New Jersey Supreme Court denying the relief sought in this case is dated April 22, 1969. The jurisdiction of this Court is invoked pursuant to 28 U. S. C. §1257(3).

Questions Presented

I.

A. Whether the maintenance of county, municipal, and smaller political subdivisions as a basis for the districting of a state assembly constitutes a denial of equal protection when the resultant population disparities between districts violate the principle of one-man, one-vote.

B. Whether Article 4, Section 2, paragraphs 1 and 3, of the New Jersey Constitution, which require the maintenance of political subdivisions in districting, are unconstitutional.

II.

Whether the reapportionment plan which combined the two predominantly black wards of Newark into one district, thereby depriving black people of the opportunity to control one assembly district, constitutes a deprivation of the right to vote guaranteed by the Fifteenth Amendment of the Constitution.

Constitutional and Statutory Provisions Involved

This petition involves the application of the Fourteenth and Fifteenth Amendments to the Constitution of the United States.

New Jersey Constitution, Article 4, Section 2, paragraph 1:

> Three (3) Senators; number; senate districts
>
> 1. The Senate shall be composed of forty senators apportioned among Senate districts as nearly as may be according to the number of their inhabitants as reported in the last preceding decennial census of the United States and according to the method of equal proportions. Each Senate district shall be composed, wherever practicable, of one single county, and, if not so practicable, of two or more contiguous whole counties. Adopted general election November 8, 1966.

New Jersey Constitution, Article 4, Section 2, paragraph 3:

> The General Assembly shall be composed of eighty members. Each Senate district of which only one senator is apportioned shall constitute an assembly district. Each of the remaining Senate districts shall be divided into Assembly districts equal in number to the number of senators apportioned to the senate district. The assembly districts shall be composed of contiguous territory, as nearly compact and equal in the number of their inhabitants as possible, and in no event shall each district contain less than eighty percent nor more than one hundred twenty percent of

one fortieth of the total number of inhabitants of the State as reported in the last preceding decennial census of the United States. Unless necessary to meet the foregoing requirements, no county or municipality shall be divided among assembly districts unless it shall contain more than one fortieth of the total number of inhabitants of the State, and no county or municipality shall be divided among a number of assembly districts larger than one plus the whole number obtained by dividing the number of inhabitants in the county or municipality by one fortieth of the total number of inhabitants of the state. Adopted general election November 8, 1966

Preliminary Statement

On April 7, 1969, the Reapportionment Commission of the State of New Jersey certified the plan under attack here. Certification was made pursuant to the order of the New Jersey Supreme Court in *Jackman* v. *Bodine*, 49 N. J. 406, 419. The New Jersey Supreme Court directed the filing of all objections to the plan by April 14, 1969 and heard arguments on the objections on April 21, 1969. Petitioners were among those who filed objections. A decision was rendered on April 22, and was received by counsel on April 23, 1969.

A three judge Federal District Court for the District of New Jersey sat on May 1, 1969 in *Mahoney* v. *Burkhardt*, Civil Action No. 1021-68, a case raising fundamentally the same challenge to the New Jersey apportionment plan as raised in the first of the Questions Presented in this peti-

tion. On May 7, 1969, the three judge court refused to stay the June 3, 1969, primary election.

Statement of the Case

The New Jersey Plan was based on 1960 Census figures and was developed through the use of computers.

The apportionment was made on the premise that county, municipal and ward lines be respected (App., *infra*, p. 28).

In accordance with Article 4, Section 2, paragraph 3 of the New Jersey Constitution forty districts were certified. This included thirty nine districts plus one at large district.

Based on the 1960 Census the "ideal" population for a New Jersey Assembly District is 151,670. This is obtained by dividing the New Jersey 1960 population by forty, the number of assembly districts.

A table showing the population of each assembly district and the percentage deviation of each district from the "ideal" is set forth in the Appendix, *infra*, pp. 31-32. Under the new apportionment plan the *average* deviation from the ideal is 5.6%, App., *infra*, p. 32. The average deviation from the ideal under the 1967 plan was 8.1%, *Jackman v. Bodine*, 49 N. J. 406, 413. Only ten of the forty districts deviate less than three percent from the ideal under the new plan. Twenty-one districts deviate five percent or more from the ideal. Six districts deviate ten percent or more from the ideal.

The greatest population disparity ranges from 127,332 (District 6B) to 171,416 (District 14B), a disparity of

43,684. The corresponding percentage variation is 15.7% below the ideal (6B) to 13.1% above the ideal (14B).

Petitioners reside in District 11B, which is the eighth largest district in the State. It has a population of 162,637, which is 7.2% above the ideal. It exceeds district 6B in population by 34,799 or 27.3%. It is the largest of the five districts in Essex County New Jersey, and exceeds the adjacent district 11C in population by 15,817, or 10.4%.

District 11B comprises the Central and South wards of the City of Newark. These wards are predominantly Negro, thereby making the black vote in Essex County the most diluted vote. Supplemental facts demonstrating the discriminatory effect of the apportionment plan on the black residents of Newark are set forth in Point II of this petition.

Reasons for Granting the Writ

I.

The maintenance of county, municipal and smaller political subdivisions as a basis for the districting of a state Assembly constitutes a denial of equal protection when the resultant population disparities between districts violate the principle of one-man, one vote. Article 4, Section 2, paragraphs 1 and 3 of the New Jersey Constitution which require the maintenance of political subdivisions in districting are therefore unconstitutional.

A. The population disparities between New Jersey Assembly Districts is unconstitutional.

In *Wesberry* v. *Sanders,* 376 U. S. 1, this Court held that, "while it may not be possible [for the States] to draw congressional districts with mathematical precision", the Constitution requires that "as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's".

In *Kirkpatrick* v. *Preisler,* 37 U. S. Law Week 4308, the Court defined that standard. That case involved a consideration of "population equality" among the ten congressional districts of the State of Missouri. The most populous district was 3.13% above the mathematical ideal, and the least populous district was 2.83% below the ideal. The average variation from the ideal was 1.6%. Seven of

the ten congressional districts deviated less than 1.89% from the ideal. *Kirkpatrick, supra* at 4309.[1]

Missouri contended first that the variation among districts was so small as to satisfy the "as nearly as practicable" limitation, and not to require independent justification.

The Court rejected this contention, stating:

> "'Since equal representation for equal numbers of people [is] the fundamental goal for the House of Representatives,' . . . the 'as nearly as practicable' standard requires that the State make a good-faith effort to *achieve precise mathematical equality.* See *Reynolds* v. *Sims,* 377 U. S. 533, 577 (1964). Unless population variances among congressional districts are shown to have resulted despite such effort, *the State must justify each variance, no matter how small.*" *Kirkpatrick, supra,* at 4309 (emphasis added).

> "Equal representation for equal numbers of people is a principle designed to prevent debasement of voting power and of access to elected representatives. Toleration of even small deviations detracts from these purposes." *Kirkpatrick, supra* at 4310.

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[1] The Missouri population variations from the ideal were as follows:

District No.	*% of Variation from Ideal*
One	+1.8
Two	+1.03
Three	— .95
Four	—2.84
Five	— .19
Six	—2.26
Seven	+1.11
Eight	+3.13
Nine	— .87
Ten	—1.88

In a companion case, *Wells* v. *Rockefeller,* 37 U. S. Law Week 4306, the Court struck down a New York redistricting plan. That plan divided New York into seven homogeneous regions, and divided each of these regions into congressional districts. The regions were not equal in population, but the districts within each region were almost identical. Thirty-one of the state's forty-one congressional districts were organized in this manner. The ten remaining districts were composed of whole counties. *Wells* v. *Rockefeller, supra* at 4307. The maximum deviation above the ideal was 6.5%, and the maximum deviation below the ideal was 6.6%. The range between the smallest and largest districts was 13.1%.

The Court, citing *Kirkpatrick, supra* struck down the New York Plan, stating:

> "The general command . . . is to equalize population in all the districts of the State and is not satisfied by equalizing population only within defined substates." *Wells* v. *Rockefeller, supra* at 4307.

When the population disparities struck down in *Kirkpatrick* and *Wells* are compared with those in the present New Jersey plan, it is clear that the latter are unconstitutional. In Missouri the *maximum* deviation from the ideal was 3.13%, while in New Jersey twenty-nine of the forty districts exceeded 3.13%. The *average* deviation from the ideal in New Jersey, 5.6%, approximates the maximum deviation in *Wells,* 6.6%.

The largest districts in each of the above districting plans exceed the smallest districts by the following percentages: 1) Missouri, 5.9%; 2) New York, 13.1% and 3) New Jersey, 28.8%.

B. New Jersey's maintenance of county, municipal and ward lines is unconstitutional.

The New Jersey apportionment plan was based on the premise that county, municipal, and ward lines (in the two largest cities) be respected (App., *infra,* p. 28). The New Jersey Supreme Court found that:

> "the work product is the best that can be had within the framework of the Constitutional provision applicable until 1970 . . . " (App., *infra,* p. 29).

The issue then is whether New Jersey's reliance on the above political subdivisions is consistent with the Fourteenth Amendment given the resultant population disparities.

This Court has already rejected the maintenance of political subdivisions as a justification for population disparities between districts:

> "Similarly, we do not find legally acceptable the argument that variances are justified if they necessarily result from a State's attempt to avoid fragmenting political subdivisions by drawing congressional district lines along existing county, municipal, or other political subdivision boundaries. The State's interest in constructing congressional districts in this manner, it is suggested, is to minimize the opportunities for partisan gerrymandering. But an argument that deviations from equality are justified in order to inhibit legislators from engaging in partisan gerrymandering is no more than a variant of the argument already rejected, that considerations of practical politics can justify population disparities." *Kirkpatrick supra* at 4310-4311.

This theme was repeated in *Wells*. New York tried to justify its scheme of constructing equal districts only within each of the seven sub-states as a means to keep regions with distinct interests intact. This Court citing *Kirkpatrick* stated that "to accept population variances, large or small in order to create districts with specific interest orientations is antithetical to the basic premise of the constitutional command to provide equal representation for equal numbers of people." *Wells* v. *Rockefeller, supra* at 4307.

The New Jersey Supreme Court distinguished *Kirkpatrick* and *Wells* as applying only to congressional districting, rather than to apportionment of a state legislative body (App., *infra*, p. 27). It further said:

> "In *Reynolds* v. *Sims*, 377 U. S. 533, 12 L. ed. 2d 506 (1964) the Court held that there may be departures within unspecified limits from mathematical equality to maintain the integrity of various political subdivisions because (1) adherence to such political lines would delay gerrymandering and (2) local governmental entities are frequently charged with various responsibilities incident to the operation of State government. 12 L. ed. 2d at 538. *Kirkpatrick* and *Wells* cast some possible doubt upon the utility of that approach with respect to item 1. i.e., gerrymandering, but nowhere suggested that the second basis is no longer viable. We therefore cannot conclude that the Supreme Court has made the mean-

ingful departure from *Reynolds* v. *Sims* which the objectors advance. App., *infra,* pp. 27-28.[2]

This Court should therefore grant certiorari to decide whether and to what extent its recent holdings in *Kirkpatrick, supra* and *Wells, supra,* applies to State Legislative districting, and to decide the extent to which, the dicta in *Reynolds* v. *Sims, supra,* concerning the maintenance of political subdivisions govern.[3]

This Court has already answered these questions by implication in *Kirkpatrick, supra* when it relied upon *Reynolds* v. *Sims, supra,* 37 U. S. Law Week 4309, 4310.

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[2] The New Jersey Supreme Court expressed reservation about its limiting *Kirkpatrick* and *Wells:*

> "We do however, have considerable doubt as to whether the basic plan of apportionment in our State Constitution is compatible with Federal Constitutional requirements as to either the Senate or Assembly. Specifically, we doubt that further apportionments can be made without exceeding permissible tolerances from mathematical equality. It may, therefore, be necessary to depart from the State Constitution's insistence that county and municipal lines be respected." App. *infra,* p. 28.

[3] The Court in *Reynolds* v. *Sims,* 377 U. S. 533, 578, stated:

> "Since, almost invariably, there is a significantly large number of seats in State Legislative bodies to be distributed within a state than congressional seats it may be feasible to use political subdivision lines to a greater extent in establishing state legislative districts than in congressional districting while still affording adequate representation to all parts of the State. To do so would be constitutionally valid, *so long as the resulting apportionment was based substantially on population and the equal population principle was not diluted in any significant way* (emphasis added).
>
> . . . . . .
>
> ". . . the overriding objective must be substantial equality of population among the various districts, so that the vote of any citizen is approximately equal in weight to that of any other citizen in the State."

Justice White, dissenting in *Kirkpatrick*, commented on this reliance on *Reynolds* v. *Sims*:

> "It also seems arbitrary for the majority to discard the suggestions of *Reynolds* v. *Sims*, 377 U. S. 533 (1964), that if a legislature seeks an apportionment plan which respects the boundaries of political subdivisions, some variations from absolute equality would be constitutionally permissible. Of course *Reynolds* involved state legislative apportionment and took pains to say that there *may be* more leeway in that context. But the Court invokes *Reynolds* today and in no way distinguishes federal from state districting." *Kirkpatrick, supra* at 4313.

Justices Harlan and Stewart, dissenting in *Kirkpatrick*, indicate that *Reynolds* has been partially undercut:

> "... The Court rejects the legislature's considered proposal simply because it seeks to remain true to traditional county and regional lines. On doing so the majority ignores the salutary warning to be found in Reynolds v. Sims, 377 U. S. 533, 578 (1963), 'Indiscriminate districting, without any regard for political subdivision or natural historical boundary lines, may be little more than an open invitation to partisan gerrymandering'. Yet today the Court condemns the legislature's approach because it 'permits groups of districts with defined interest orientations to be overrepresented at the expense of districts with different interest orientations.' *Wells* v. *Rockefeller* at 4-5. Of course, all districting divisions inevitably involve choices between different interest groups. But as *Reynolds* recognized, legislatures prefer to follow

traditional county and regional lines so that the demands of blatant partisanship will be tempered by the constraints of history and tradition. If the court believes it has struck a blow today for fully responsive representative democracy, it is sorely mistaken. Even more than in the past district lines are likely to be drawn to maximize the political advantage of the party temporarily dominant in public affairs." *Kirkpatrick supra* at 4315.

Alternatively, petitioners submit that *Reynolds* is consistent with *Kirkpatrick* because it tolerates the maintenance of political subdivisions only "so long as" the "equal population principle is not diluted in any significant way," and because "the overriding objective must be substantial equality of population among the various districts." *Reynolds* v. *Sims, supra* at 578, 579. Under this test too, the New Jersey apportionment plan must fall.

II.

The reapportionment plan which combined the two predominantly black wards of the City of Newark into one district thereby depriving black people of the opportunity to control one assembly district constituted a deprivation of the right to vote guaranteed by the Fifteenth Amendment to the Constitution of the United States.

The facts of the racial deprivation complained of are as follows.

There are five wards in the City of Newark. Under the 1967 reapportionment plan in New Jersey, District 11C included the North Ward of Newark, the Town of Nutley, and the Town of Belleville. This district had a population of 146,814. It is unchanged by the new plan.

District 11A formerly comprised the East and South Wards of Newark with a population of 160,040. District 11B formerly comprised the Central and West Wards of Newark with a population of 162,884. The population disparity between District 11A and 11B was 2,844.

The new District 11A comprises the West and East Wards with a population of 160,293. The new District 11B comprises the Central and South Wards with a population of 162,631. The difference in population between the new 11A and 11B is 2,338.

The percentage deviation from the ideal for 11A has *increased* from 5.5% under the 1967 plan to 5.7% under the present plan. The deviation from the ideal for 11B has decreased from 7.4% under the old plan to 7.2% under the

new plan. As a result of the new realignment the difference in population between 11A and 11B has been reduced by 506.

The realignment of the Central and South Wards into 11B concentrates in that district the majority of black citizens of the City of Newark.

Under the old District 11A, approximately 60% of the registered voters were black. App., *infra,* p. 33. Under the old District 11B approximately 48% of the registered voters are black. *Ibid.*

Under the old alignment, George Richardson, a black man, was elected from District 11A. App. *infra,* p. 34. Black people possessed the potential to elect two black assemblymen under the old 11A, and possessed the potential to elect two candidates, white or black, who are responsive to their needs.

Under the old District 11B, Ronald Owens, a black man was elected to the assembly. Black people possessed the potential to elect at least one black representative, and two representatives who are responsive to their needs.

Under the new district 11B, black voters comprise approximately 85% of the registered voters. App., *infra,* p. 33. Under the new district 11A, black voters comprise approximately 24% of the registered voters. *Ibid.*

Under the new alignment black people have lost control of one Assembly District, App., *infra,* p. 34, or two representatives.

As seen, the realignment of the four wards results in negligible mathematical improvement towards the goal

of one-man one-vote, assuming the validity of the 1960 census figures. In reality, the realignment has probably widened the mathematical deviation from the ideal for District 11B, for as Mr. Justice Fortas has noted in his concurring opinion in *Kirkpatrick, supra* at 4312, the 1960 census undercounted the non-white populations by 8.2%. Since the new District 11B is approximately 85% black today, the population there suffered significant undercounting. The calculations showing that 11B is .2% closer to the ideal is therefore inaccurate. The new alignment does not further the principle of mathematical equality between districts.

In addition, the realignment produces less compact districts than the old system. Compare the map, App., *infra,* p. 36, which represents the current plan, with the map, App., *infra,* p. 37, which shows the old alignment. This violates Article 4, Section 2, paragraph 3 of the New Jersey Constitution which requires that Assembly Districts be "as nearly compact . . . as possible . . . "

It can further be seen from examining the map at p. 36, *infra,* that the West Ward touches the East Ward at a narrow section which comprises in actuality a four block strip. The East and West Wards form a "horseshoe" around the Central Ward, a districting configuration condemned by the New Jersey Supreme Court in *Jackman* v. *Bodine,* 49 N. J. 406, 419. In addition, there is no constitutional or judicial compulsion or authorization to use ward lines as a basis for districting.

No one will seriously contest the fact that the *consequence* of the realignment of Assembly Districts 11A and 11B is to substantially reduce the voting strength of Newark's black voters in elections to the State Assembly.

Whereas under the former district alignment the black voters were a majority or near majority in two voting districts, with the opportunity to have a substantial voice in the election of four assemblymen, under the new scheme they are practically wholly confined to one district, restricted to influencing the election of only two assemblymen.

The problem posed by this case goes to the legal consequence of that fact. It was the obvious view of the court below that the mere statement of such an *effect* had no legal consequence at all, that in order to challenge such a reapportionment scheme, the plaintiffs would have to allege and prove that that effect was the subjective design of the redistricting body.[4] It is petitioners' contention that that is a totally erroneous view of the governing law.

The controlling doctrine as laid down by this Court in prior cases is that once plaintiff demonstrates that the result of an election districting scheme is to nullify the black voters' "ability to elect the candidate of their choice," *Allen* v. *State Board of Elections,* 89 S. Ct. 817, 834 (1969), the burden is shifted to the defendant to show some "countervailing . . . function" for the action. *Gomillion* v. *Lightfoot,* 364 U. S. 339, 342 (1960). It is further clear that in the instant case the alleged justification claimed by the defendants is insubstantial if not wholly frivolous.

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[4] The Court below did not deal with this point at all in its written opinion. After disposing of the *Kirkpatrick* issue, the Court said: "We have considered all of the other objections. It is clear that the Commission abided faithfully by the computer output. The objections in effect amount to claims that the Commission should have departed from the results so reached in order to recognize sundry alleged interests." App., *infra,* p. 30. It was clear in oral argument however that at least several members of the court felt the plaintiffs had the burden of proving the defendants' subjective intent to discriminate on racial lines.

Just this Term, if it had not already done so in *Gomillion*, this Court made clear that the right to vote protected by the Fifteenth Amendment was something beyond the mere right of one black (or other racial minority member) citizen to cast his one vote. In *Allen* v. *Board of Elections*, the Court was concerned with the ability of the class of black voters in a county to vote effectively, noting:

> "Voters who are members of a racial minority might well be in the majority in one district, but in a decided minority in the county as a whole. This type of change could therefore nullify their ability to elect the candidate of their choice just as would prohibiting some of them from voting." 89 S. Ct. at 833-34.

While *Allen* was not a case interpreting the Fifteenth Amendment as such, it was concerned with the effectuation of the Voting Rights Act passed pursuant to the Fifteenth Amendment. More important, though, the case recognizes that the nature of the right to vote, guaranteed to black citizens by both the Voting Rights Act and the Fifteenth Amendment, must be viewed from the perspective of the entire class, not merely its individual members. Of course, the Court had much earlier recognized the same principle when it rested its decision in *Gomillion* on the Fifteenth, and not the Fourteenth Amendment, as had been urged by the concurring opinion. By resting *Gomillion* on the Fifteenth, not merely invalidating the statute challenged there as an invidious racial classification under the Fourteenth Amendment, the Court was saying that the Fifteenth Amendment protected the right to effective participation in the political process of the class of black voters formerly resident of Tuskegee.

And as *Gomillion* makes clear, once the adverse effect on Fifteenth Amendment rights is demonstrated, the burden is placed upon the state to come forward with its countervailing reasons justifying the injury. This is, of course, what distinguishes the type of Fifteenth Amendment claim exemplified by *Allen* and *Gomillion* from the Fourteenth Amendment claim involved in *Wright* v. *Rockefeller,* 376 U. S. 52. In *Wright,* the plaintiff alleged no injury to voting rights. All he alleged was a racial classification. The Court held that in the absence of some specific injury to cognizable rights, the burden was on the plaintiff to show the racial classification was the result of invidious motive.

Petitioners suggest that the Court below confused the two separate standards, and viewed what is in fact a Fifteenth Amendment claim of injury to cognizable voting rights by a Fourteenth Amendment standard limited to situations involving racial classifications *per se.* Thus the Court below would require of plaintiffs the "impossible burden," *Wright* v. *Rockefeller,* 376 U. S. at 73 (dissenting opinion of Mr. Justice Goldberg), of showing subjective "racial motivation," on the part of the defendants. Such an "impossible burden" may not do significant harm where the only injury is in the classification itself. It is obviously inappropriate when dealing with the type of substantial interest involved in a case such as *Allen* or the instant case.

What kind of justification do the defendants claim for doing such injury to the voting rights of Newark's black population? It is clear that the main justification claimed by the defendants is their efforts to respect pre-existing political boundaries, to wit, Newark's ward system, and surrounding municipal lines. Thus this case comes down to

a determination of whether concern for geographical lines is sufficient to override the interest of the effected class of black voters. The question would seem to be rhetorical. Since the sanctity of political boundaries has been constantly rejected as justification for denying the Fourteenth Amendment right of equality of voting power (see discussion in Point I), there is surely no reason to suppose it is sufficient to override the Fifteenth Amendment rights of black people to effective participation in the political process.

Furthermore, even the claim that the regrouping of Newark's Central and South wards was necessary in order to preserve political boundaries while carrying out, as nearly as possible, the one-man one-vote standard, verges on sophistry. As noted, the mathematical improvement is imperceptible. (Compare the coefficient of variation on the accepted map .03727 (App., *infra,* p. 36) with that of the rejected map .03739 (App., *infra,* p. 37).)

This *de minimis* improvement is not sufficient justification. Indeed, the fact is that their conclusion is based on clearly antiquated data and in fact the realignment has probably significantly worsened the population deviation of the two districts, in light of the fact that the census figures used ignore ten years of massive shifting in Newark's population. In reality, the realignment has probably widened the mathematical deviation from the ideal for District 11B.

It was certainly equally incumbent upon the Commission to take into account the effect of a realignment of districts upon the effectiveness of the voting strength of Newark's black citizens. The Commission could not be unaware of the findings of the Governor's Select Commis-

sion on Civil Disorder, State of New Jersey, February 1968, "Report for Action," that Commission recommended at page 162:

> "To help relieve the feeling of Negro powerlessness, both political parties should support the emergence of more Negro candidates and should encourage active participation of Negroes of all economic levels in this political process."

It is no response for the State to say that the discriminatory result occurred in good faith, for petitioners contend that the Fifteenth Amendment forbids unintentional as well as intentional deprivations of the right to vote. "Constitutional rights would be of little value if they could be thus indirectly denied." *Smith* v. *Allwright,* 321 U. S. 649, 664; *NAACP* v. *Alabama,* 357 U. S. 449, 461.

"[C]onstitutional provisions, whether operating by way of grant or limitation, are to be enforced according to their letter and spirit, and cannot be evaded by any legislation which, though not in terms trespassing on the letter, yet in substance and effect destroy the grant or limitation." *Fairbank* v. *United States,* 181 U. S. 285, 300. See also *Minnesota* v. *Barber,* 136 U. S. 313, 319.

CONCLUSION

Petitioners have asserted substantial federal claims raising important constitutional rights. For the reasons submitted, petitioners respectfully pray that a petition for writ of certiorari be granted.

Respectfully submitted,

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May 21, 1969

APPENDIX

Opinion of the Supreme Court of the State of New Jersey

SUPREME COURT OF NEW JERSEY

A-139 September Term 1968

CHRISTOPHER JACKMAN, *et al.*,

Plaintiffs-Appellants,

—v.—

JOHN M. BODINE, *et al.*,

Defendants-Respondents.

THE ELIZABETH DAILY JOURNAL, *et al.*,

Plaintiffs-Appellants,

—v.—

ROBERT J. BURKHARDT, *et al.*,

Defendants-Respondents.

In the Matter of the
Apportionment Commission
Plan for 1969

Argued April 21, 1969. Decided April 22, 1969.

On Appeal from the Recertification of General Assembly Districts by the New Jersey Apportionment Commission to the Secretary of State of New Jersey.

Mr. William Miller argued the cause for the Apportionment Commission (*Mr. Arthur J. Sills*, Attorney General; *Mr. Allen D. Porter* on the brief).

Mr. Martin Klughaupt argued for plaintiff, Hirkala.

Mr. Louis Schwartz for Intervenors Mecca and Curcio.

Mr. Lawrence I. Lerner argued for appellants, Scrimmager and Sharper.

Mr. Harris David argued for appellant Harris.

Mr. John F. Boyle argued for intervenors Ehrhart, De Lazaro, Orkin and McGowan. (*Messrs. Sauer and Boyle*, attorneys; *Mr. Richard A. Daubner* on the brief.)

Mr. Myron Gottlieb for appellants Tutek and Soltesz.

Mr. James P. Dugan for appellant Lavin.

Mr. Gerald Goldman argued for the intervenor Dudlak.

Mr. Sherwin Lester argued the cause in support of the Bergen County Plan.

PER CURIAM

This case involves the apportionment of the State for the purpose of election of assemblymen. In *Jackman* v. *Bodine*, 49 N. J. 406 (1967), we sustained the apportionment plan there involved for the purpose of the 1967 election, subject to certain modifications, and said (p. 419):

> "* * * As to the Assembly election scheduled for the year 1969, ample time exists for a full exploration of the challenged deviations and the reasons therefor. To that end the 11-man Apportionment Commission shall continue in office and make a seasonable recertification of Assembly districts for the 1969 election."

See also *Jackman* v. *Bodine*, 50 N. J. 127 (1967).

The Apportionment Commission did not certify its new work product until April 7, 1969. We thereupon directed the filing of all objections by April 14, 1969 to the end that such challenges as might be made could be heard and resolved in time to permit the primary election scheduled for June 1969.

The objections filed included the claim that recent decisions in *Kirkpatrick* v. *Preisler*, —— U. S. ——, —— L. ed. 2d —— (April 7, 1969) and *Wells* v. *Rockefeller*, —— U. S. ——, —— L. ed. 2d —— (April 7, 1969), undercut the doctrine upon which our earlier decisions rested. Specifically, it is asserted that the cases just cited will permit no deviation from population equality by reason of adherence to county or municipality lines. Those cases involved congressional districting rather than apportionment of a State legislative body. In *Reynolds* v. *Sims*, 377 U. S. 533, 12 L. ed. 2d 506 (1964) the Court held that there may be departures, within unspecified limits, from mathematical equality to maintain the integrity of various political subdivisions because (1) adherence to such political lines would deter gerrymandering[1] and (2) local governmental entities are frequently charged with various responsibilities incident to the operation of State government, 377 U. S. at ——, 12 L. ed. 2nd at 538.[2] *Kirkpatrick* and *Wells* cast some possible doubt upon the utility of that approach with respect to item 1; i.e. gerrymandering, but nowhere suggested that the second basis is no longer viable. We there-

[1] • • • Indiscriminate districting, without any regard for political subdivision or natural or historical boundary lines, may be little more than an open invitation to partisan gerrymandering. 12 L. Ed. 2d at 537.

[2] • • • Local governmental entities are frequently charged with various responsibilities incident to the operation of state government. In many states much of the Legislature's activity involves the enactment of so-called local legislation, directed only to the concerns of particular political subdivisions. 12 *L. Ed. 2d* at 538.

fore cannot conclude that the Supreme Court has made the meaningful departure from *Reynolds* v. *Sims* which the objectors advance.

We do, however, have considerable doubt as to whether the basic plan of apportionment in our State Constitution is compatible with Federal Constitutional requirements as to either the Senate or Assembly. Specifically, we doubt that further apportionments can be made without exceeding permissible tolerances from mathematical equality. It may, therefore, be necessary to depart from the State Constitution's insistence that county and municipal lines be respected. It is perfectly clear that if reapportionment for the State legislative purposes had to be redone without reference to such lines, the practical problems would preclude the scheduled primary election and perhaps, also, a general election this year. We have in mind not only the time period which said reapportionment would entail but also the impact of such reapportionment upon the detailed election machinery. The scheduled election to the Assembly will be the last before the new census and there will be no election to the Senate prior to that event. Mindful of the need to continue orderly government, we are constrained to conclude that the broad constitutional issue to which we have just referred should not be entertained at this time. We will however schedule the subject for full argument this fall, to the end that the matter may be settled, if possible, well in advance of the 1971 election.

It remains, therefore, to consider the objections to the new apportionment on the basis of our earlier decision. The apportionment was made on the premise that county, municipal and ward lines (in the two largest cities) could be respected. Upon that premise, the Commission, with one exception to which we will presently refer, selected

with respect to each assembly district a map prepared with the aid of a computer which contained the least deviation from numerical equality within the Senate districts. The results are an improvement on the original work product insofar as intra-senate-district equality is concerned, and to some extent an improvement insofar as Statewide mean average is concerned. The improvements may be viewed as modest, especially in the light of the practical impact of changes at this late hour, but the work product is the best that can be had within the frame work of the Constitutional provision applicable until 1970, and the Federal Constitution requires no less.

As we said in the paragraph above, there was one departure by the Commission from its policy to accept the best plan revealed by the computer. The exception related to Bergen County, and the reason assigned was the inability to complete the task by computer in time for the Commission's certification. However, the computer operation was continued and yielded 30 maps which were available by the time of argument before us. We, therefore, remanded the matter to the Commission for a supplemental report as to Bergen County. The Commission deadlocked (one member did not attend) upon the best of said maps and did not undertake to vote upon the remaining maps. This map (marked No. 1) contains a deviation range of only 39 out of 156,000 plus, and is on that basis better than the hand-map the Commission certified. We are satisfied that Bergen County must be districted upon the same computer approach as was used for the rest of the State and hence it is our judgment that the Commission's certified report is amended accordingly.

We have considered all of the other objections. It is clear that the Commission abided faithfully by the computer output. The objections in effect amount to claims that the Commission should have departed from the results so reached in order to recognize sundry alleged interests. To do so would have violated the controlling doctrine.

Since the district lines have been changed in many instances, it is necessary to extend the time for filing nominating petitions. The time is hereby extended to and including April 30, 1969. If further departures from the statutory time table are needed, application may be made to us on short notice.

A.D.		Dev. %	Description
1	155,405	+ 2.8%	Cape May County, Cumberland County.
2	160,880	+ 6.0%	Atlantic County.
3A	146,392	— 3.5%	Camden, Salem, Gloucester Counties.
3B	146,392	— 3.5%	Camden and Gloucester Counties.
3C	146,391	— 3.7%	Camden and Gloucester Counties.
3D	146,411	— 3.5%	Camden County.
4A	166,370	+ 9.7%	Burlington and Ocean Counties.
4B	166,370	+ 9.7%	Burlington and Ocean Counties.
5A	167,200	+10.3%	Monmouth County.
5B	167,201	+10.3%	Monmouth County.
6A	138,560	— 8.6%	Mercer County.
6B	127,832	—15.7%	Mercer County.
7A	143,985	— 5.1%	Middlesex County.
7B	144,094	— 5.0%	Middlesex County.
7C	145,777	— 3.9%	Middlesex County.
8	143,913	— 5.1%	Somerset County.
*9A	143,276	— 5.5%	Union County.
*9B	142,505	— 6.0%	Union County.
*9C	142,639	— 5.9%	Union County.
10A	130,810	—13.8%	Morris County.
10B	130,810	—13.8%	Morris County.
11A	160,293	+ 5.7%	Essex County.
11B	162,631	+ 7.2%	Essex County.
11C	146,814	— 3.2%	Essex County.
11D	159,623	+ 1.3%	Essex County.

* Population figures modified to compensate for Assembly at Large seat in County.

A.D.		*Dev. %*	*Description*
11E	149,372	— 1.5%	Essex County.
11F	150,812	— .6%	Essex County.
*12A	165,802	+ 9.4%	Hudson County.
*12B	145,298	— 4.2%	Hudson County.
*12C	153,341	+ 1.1%	Hudson County.
*12D	146,293	— 3.5%	Hudson County.
13A	156,069	+ 2.9%	Bergen County.
13B	155,914	2.8%	Bergen County.
13C	156,143	2.9%	Bergen County.
13D	156,103	2.9%	Bergen County.
13E	156,026	+ 2.9%	Bergen County.
**14A	159,367	5.1%	Passaic County.
**14B	171,416	13.1%	Passaic County.
15	166,582	9.9%	Hunterdon County, Sussex County, Warren County.
Average deviation		± 5.6	

* Population figures are only approximate as population figures of Jersey City Wards were not readily available to the writer.

** Population figures modified to compensate for Assembly at Large seat in County.

AFFIDAVIT

STATE OF NEW JERSEY, ss.:
COUNTY OF , *ss.*:

I, Earl Harris, after being duly sworn do depose and say:

1. I am a Black citizen of the city of Newark and of the State of New Jersey. I reside in the newly formed district 11B. I am 47 years of age.

2. I served as a Essex County Freeholder from 1963-66.

3. The following is the approximate number of registered voters in each ward of the city of Newark that is Black:

Ward	
NORTH	6,500
SOUTH	24,000
EAST	7,500
WEST	5,200
CENTRAL	19,000

4. The following is the approximate number of registered voters in each of the five (5) wards.

Ward	
NORTH	34,064
SOUTH	30,105
EAST	22,336
WEST	30,105
CENTRAL	20,201

5. The old District 11A, comprised the South and East ward. George C. Richardson, a Black citizen, was elected to the State Assembly in 1967. It is my opinion, that Black people have the voting strength and political strength to elect two Black representatives from the old district 11A.

6. In addition, under the old District 11B which comprised the Central and West wards, Black people had the voting strength and the population strength to elect two Black representatives.

7. The realignment of the West and East wards into 11A has eliminated the possibility that a Black person can be nominated in the primary election.

8. The grouping of the Central and South wards into 11B has grouped the most populous Newark wards. This assures the election of two Black representatives.

9. The realignment of the four (4) wards has therefore eliminated the opportunity to elect two Black representatives, which opportunity existed under the old 11A, and is now highly improbable under the new 11A.

10. I obtained the number of registered voters in each ward from the Office of the City Clerk of the City of Newark of Essex County. The percentage of these voters that were Black was obtained from studies made by Black civic-minded organizations. These studies are based on street-to-street surveys of registered voters. The names of registered voters in the city of Newark are furnished on police sheets which are obtained from the office of the County Clerk in Essex County. From the police sheets we make

a survey and a determination on a house-to-house bases which voters are black.

11. There is a wide spread feeling of the Black in Newark that the Reapportionment Plan was designed to gerrymander the districts in such a manner as to eliminate additional Black people from being elected from the State Assembly.

EARL HARRIS

Sworn to and subscribed before me
this 18th day of April 1969.

MARY C. BENDERS
Notary Public
Mary C. Benders
Notary Public of N. J.
My Commission Expires July 22, 1973

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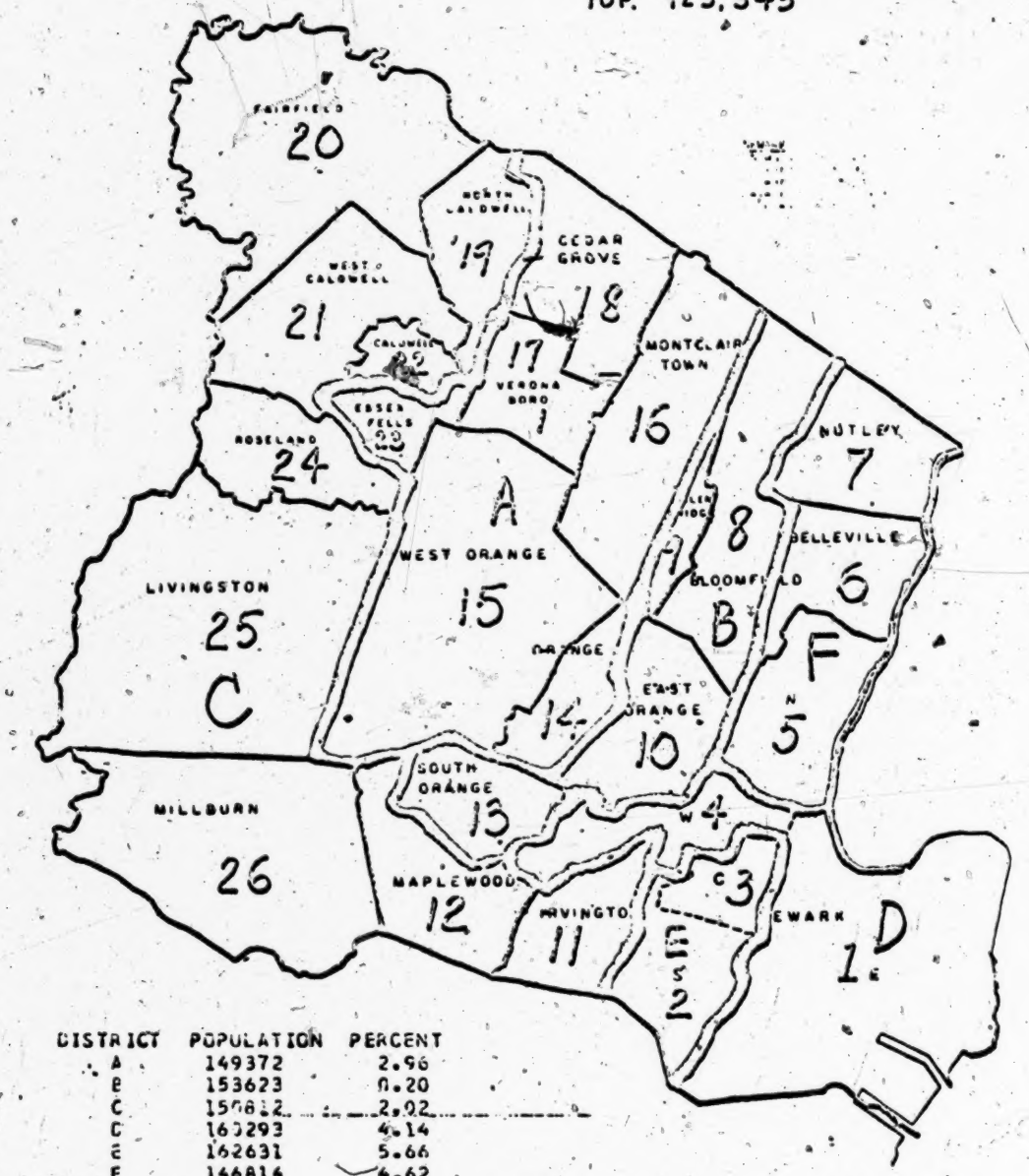
M 76

1

ESSEX COUNTY

POP. 923,545



DISTRICT	POPULATION	PERCENT
A	149372	2.96
B	153623	0.20
C	150812	2.02
D	160293	4.14
E	162631	5.66
F	146814	4.62

RANGE	15017
MEAN DEVIATION	5025.16466
STANDARD DEVIATION	5736.15522
COEFFICIENT OF VARIATION	0.03727

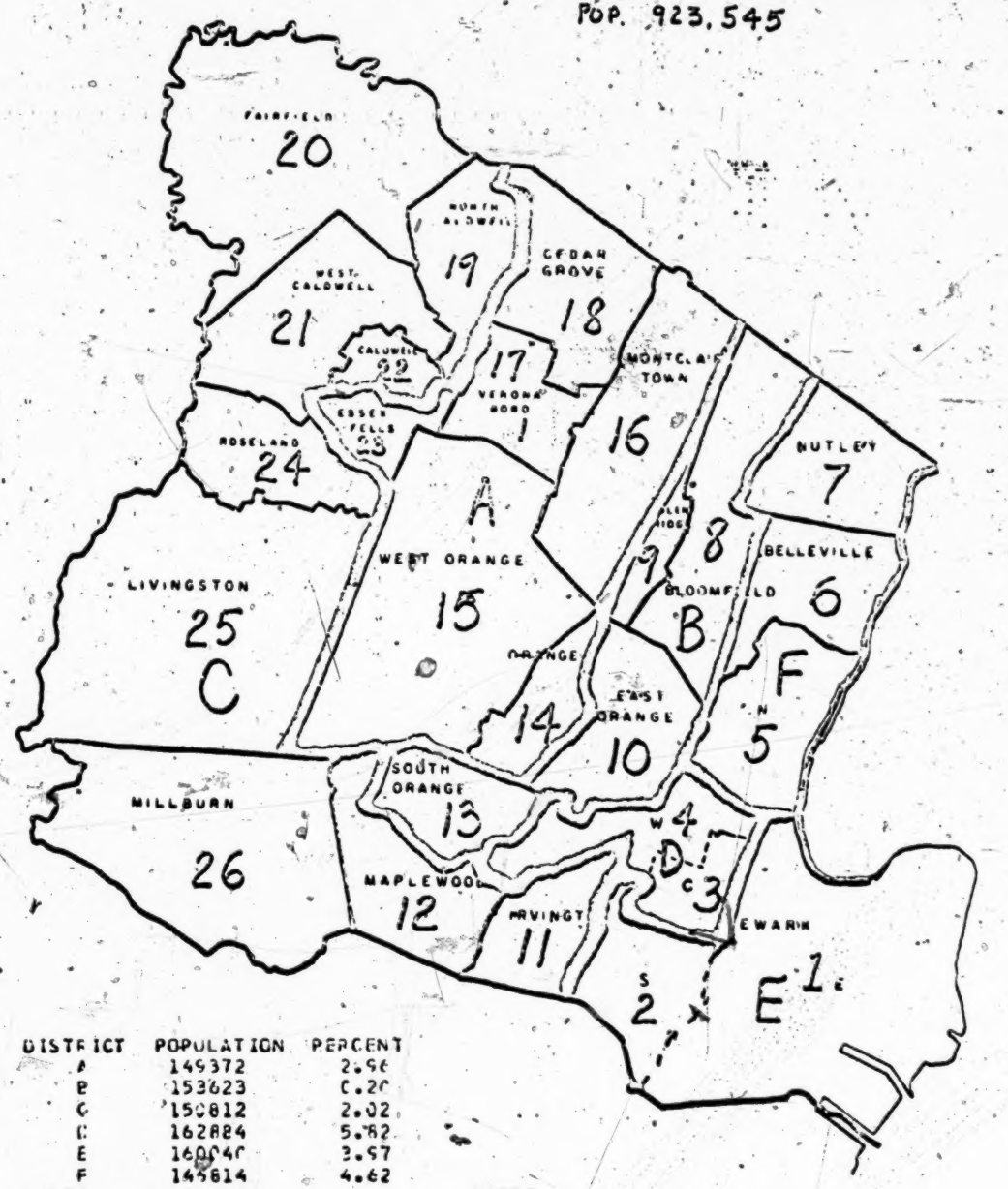
168

37

4

ESSEX COUNTY

POP. 923,545



DISTRICT	POPULATION	PERCENT
A	149372	2.96
B	153623	0.20
C	150812	2.02
D	162884	5.82
E	160040	3.97
F	146814	4.62

RANGE	16070
MEAN DEVIATION	5025.16466
STANDARD DEVIATION	5755.21054
COEFFICIENT OF VARIATION	0.03739

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IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1969

No. [redacted] 140

CHRISTOPHER JACKMAN, et al.,

v.

JOHN M. BODINE, et al.

THE ELIZABETH DAILY JOURNAL, et al.,

v.

ROBERT J. BURKHARDT, et al.

IN THE MATTER OF THE APPORTIONMENT COMMISSION PLAN FOR 1969.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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MacCrellish & Quigley Co., Printers, Trenton, New Jersey

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ARGUMENT

The petition for a writ of certiorari should be denied since the action of the New Jersey Supreme Court lacks the finality required for review by the United States Supreme Court, Under 28 U. S. C. § 1257.

In *Jackman* v. *Bodine,* 43 N. J 453, 478, 205 A. 2d 173 (1964), the New Jersey Supreme Court reserved "jurisdiction in this cause to determine applications for such further or different relief as may be appropriate and to determine such further relevant controversies as may arise." Following the adoption of the New Jersey Constitutional Amendments, by referendum of November 8, 1966, the same court considered the constitutionality of the New Jersey constitutional provisions in light of the decisions of this Court. In *Jackman* v. *Bodine,* 49 N. J. 406, 231 A. 2d 193 (1967), the State court remanded certain matters of apportionment to the Apportionment Commission with the instruction that it "make a seasonable recertification of assembly districts for the 1969 election." (47 N. J. at 419-420.)

On March 4, 1969, the State court heard a petition by the Apportionment Commission for leave to intervene in *Jackman* v. *Bodine* and for instructions. The court denied the petition without prejudice to renewal, but did answer several questions posed by the petition, in the course of the oral argument on the motion. The Apportionment Commission accelerated its proceedings and made its recertification on April 7, 1969.

The State court thereupon, upon its own motion, notified all parties to *Jackman* v. *Bodine* and any other interested parties to file objections by April 14, and permitted the Apportionment Commission to respond by April 18.

In response to the State court invitation, nine challenges to the apportionment as certified were heard. These in-

cluded various details of the effect of the apportionment in specific situations. With two exceptions, there were no formal pleadings filed. All objectors, including the present petitioners, were heard on April 21, 1969, informally, upon the basis of memoranda submitted to the court. The present petitioners have never filed a complaint, and the State court has yet to render a judgment in the matter at bar.

In its per curiam opinion disposing of the various objections to the apportionment as certified, 53 N. J. 585, ... A. 2d ... (1969), the State Supreme Court wrote at 589:

> "Mindful of the need to continue orderly government, we are constrained to conclude that the broad constitutional issue to which we have just referred should not be entertained at this time. We will however schedule the subject for full argument this fall, to the end that the matter may be settled, if possible, well in advance of the 1971 election."

Subsequently, on May 14, 1969, the Clerk of the Supreme Court of New Jersey circulated the following memorandum:

> "TO COUNSEL IN THE REAPPORTIONMENT CASES
>
> These cases have been set down for further argument on Monday, September 22, 1969, with respect to the constitutionality of the provisions of our State Constitution respecting apportionment.
>
> All briefs shall be filed by August 15th and shall deal with all questions, including the question whether it is possible to adhere to the following lines without creating intolerable deviation from the one man-one vote concept: (1) county lines, (2) municipal lines, (3) ward lines and (4) election district lines. Applications to intervene shall be filed with the Court not later than June 15, 1969."

Review in this Court upon writ of certiorari is limited to *"final judgments or decrees"* of the highest court of a state. 28 U. S. C. § 1257. This requirement of finality of the State court decision has been repeatedly applied by this Court.

The requirement that there be a final State court judgment is based on two major considerations: (1) orderly judicial processes which avoid piecemeal review and (2) smooth and harmonious functioning of the state and federal judicial systems. See, *e.g., Republic National Gas Co. v. Oklahoma,* 334 U. S. 62 (1948). For a general discussion of the finality doctrine, see *Annotations,* 97 L. Ed. 208 and 89 L. Ed. 1186; see also Boskey, *Finality of State Court Judgments under the Federal Judicial Code,* 43 Colum. L. Rev. 1002.

In the present posture of the case at bar, the action of the State court is anything but final. It has permitted further applications to intervene until June 15, 1969, and has required additional briefs to be filed by August 15, for a further argument set down for September 22, 1969. Thus, no judgment has been entered, nor will any judgment be entered, disposing of the constitutional issues which have been raised until after the argument on September 22. An application to this Court for a writ of certiorari is thus premature in light of the pending posture of the matter before the State court.

The petitioners might argue, in reply, that they should not be frustrated by the action of the State court in deferring a decision on the basic constitutional issue. There are two simple answers to such an argument: first, to the extent petitioners have selected the forum, they must abide by its processes; and, second, if the petitioners are unwilling to abide by the State court's processes, they have the alternative of invoking the jurisdiction of a three-judge federal court, with the right of direct appeal to this Court. *Swift and Co.* v. *Wickham,* 328 U. S. 111 (1946).

Other objectors have in fact challenged the senate districts by invoking a three-judge court in *Mahoney* v. *Burkhardt*, U. S. Dist. Court, N. J. Civil Action No. 1021-68. On May 7, 1969, the three-judge court dismissed the action to permit the orderly processes of the New Jersey Supreme Court to be concluded.

CONCLUSION

The petition for writ of certiorari should be denied for lack of a final judgment or decree to which it could relate. The State court has scrupulously applied the prescriptions of this Court in the previous litigation in the *Jackman* v. *Bodine* series of decisions, and should be allowed to proceed with an orderly review of the present challenges.

Respectfully submitted,

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WILLIAM MILLER,
Special Counsel,
Of Counsel and on the Brief.

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FILED
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IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1969

No. [redacted] 140

CHRISTOPHER JACKMAN, *et al.*,

v.

JOHN M. BODINE, *et al.*

THE ELIZABETH DAILY JOURNAL, *et al.*,

v.

ROBERT J. BURKHARDT, *et al.*

IN THE MATTER OF THE
APPORTIONMENT COMMISSION PLAN FOR 1969

On Petition for Writ of Certiorari to the Supreme Court of the State of New Jersey

---

BRIEF OF RESPONDENT ROBERT J. BURKHARDT, SECRETARY OF STATE OF NEW JERSEY IN OPPOSITION

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Attorney for Respondent,
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STEPHEN G. WEISS,
Assistant Attorney General,
Of Counsel and on the Brief.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 1421

CHRISTOPHER JACKMAN, *et al.*,

v.

JOHN M. BODINE, *et al.*

THE ELIZABETH DAILY JOURNAL, *et al.*,

v.

ROBERT J. BURKHARDT, *et al.*

IN THE MATTER OF THE
APPORTIONMENT COMMISSION PLAN FOR 1969

On Petition for Writ of Certiorari to the Supreme Court of the State of New Jersey

Counter-Statement of Question Presented

Would the grant of a writ of certiorari be proper under 28 U.S.C. ¶1257(3) where the subject matter of the petition is still pending full hearing and adjudication in a state court proceeding in which petitioners are parties and may obtain complete relief?

Counter-Statement of the Case

The petitioners herein seek a review of the opinion of the New Jersey Supreme Court in *Jackman, et al.* v. *Bodine, et al.; The Elizabeth Daily Journal, et al.* v. *Burkhardt, et al.* and *In the Matter of the Apportionment Commission Plan for 1969,* 53 N. J. 585 (1969). P.App. pp. 25 to 30.[1] This was the seventh in a series of opinions by the New Jersey Supreme Court in *Jackman* v. *Bodine* since 1964.[2]

Plaintiffs Jackman, *et al.*, were taxpayers and residents of New Jersey who in 1963 filed suit for a declaratory judgment in the New Jersey Superior Court, Chancery Division, seeking to upset New Jersey's then existing plan of state legislative apportionment. At that time the state constitution provided for the allocation of one Senator to each of New Jersey's 21 counties and apportioned 60 Assemblymen among the several counties according to population. Art. IV, Sec. II, par. 1; Sec. III, par. 1, N. J. Const., 1947. Defendant Bodine was the clerk of one of the counties and his co-defendants were four other county clerks, the Secretary of State (Mr.

---

[1] References to Petitioners' Appendix will be designated "P.App.". References to Respondent Burkhardt's Appendix will be designated "R.App.".

[2] (1) 43 N. J. 453 (1964);

(2) 43 N. J. 491 (1964);

(3) 44 N. J. 312 (1965);

(4) 44 N. J. 414 (1965);

(5) 49 N. J. 406 (1967);

(6) 50 N. J. 127 (1967);

(7) 53 N. J. 585 (1969).

Burkhardt), the President of the Senate and the Speaker of the General Assembly. In its first *Jackman* v. *Bodine* opinion in November 1964 the New Jersey Supreme Court, armed with the six landmark decisions rendered by this Court in June of that year[3], struck down New Jersey's constitutional apportionment provisions noting that ". . . on their face, [they] do not meet the test of *Reynolds* v. *Sims*." *Jackman* v. *Bodine*, 43 N. J. 453, 459.

Following this decision temporary legislation reapportionment both houses of the New Jersey Legislature was enacted. The New Jersey Supreme Court had, in the interim, found the General Assembly apportionment temporarily acceptable. See *Jackman* v. *Bodine*, 44 N. J. 312 (1965). This temporary legislation established an interim plan for the Senate which allocated 29 Senators among 14 districts composed of one or more whole counties.

An attack on this interim plan was thereafter rejected by the New Jersey Supreme Court. See *Jackman* v. *Bodine*, 44 N. J. 414 (1965). There, the court expressly recognized the propriety of honoring existing county lines in forming legislative districts even though:

> "[O]bviously the districts cannot be of equal population, and the deviations are likely to be larger than those incidental to the creation of original districts indifferent to existing or other political subdivisions." *Id.* at p. 417.

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[3] *Reynolds* v. *Sims*, 377 U. S. 533 (1964); *WMCA, Inc.* v. *Lomenzo*, 377 U. S. 633 (1964); *Maryland Committee for Fair Representation* v. *Tawes*, 377 U. S. 656 (1964); *Davis* v. *Mann*, 377 U. S. 678 (1964); *Roman* v. *Sincock*, 377 U. S. 695 (1964) and *Lucas* v. *Forty-Fourth General Assembly of Colorado*, 377 U. S. 713 (1964).

However, in upholding the validity of the legislation as an acceptable transitional step, the court cautioned that it should not necessarily be assumed that it would be considered suitable as a permanent arrangement. In view of legislation then pending (and subsequently enacted) to provide for the calling of a Constitutional Convention to consider the apportionment question in its entirety, the Court refrained from scheduling further argument upon the issue of whether a Convention was the sole vehicle appropriate to devise a permanent plan.

The Convention, whose delegates were duly elected on a bi-partisan basis, met in 1966 and proposed an entirely new constitutional apportionment structure for the State. Essentially, New Jersey was to be divided into 15 Senatorial districts composed of whole counties, to which 40 Senators were allocated. Each Senate district was to be allocated 2 Assemblymen per Senator and the task of drawing boundary lines for the dual member General Assembly sub-districts was assigned to a bi-partisan Apportionment Commission. Art. IV, Sec. II, Pars. 3 and 4; Sec. III, Pars. 1, 2 and 3; Art. IX, Sec. I; Sec. IV, N. J. Const., 1947, as amended. In establishing General Assembly sub-districts the Commission was expressly precluded from dividing a county or municipality unless the failure to do so would result in a sub-district whose population exceeded 1-40th of the total number of inhabitants of the State. Article IV, Sec. II, Par. 3, N. J. Const., 1947 as amended. In practice, this meant that only Newark and Jersey City could be divided between or among more than one sub-district.

In November 1966 the people of the State approved the proposed constitutional amendment at a general election. However, shortly thereafter suit was brought challenging this plan, culminating in the New Jersey

Supreme Court decision in *Jackman* v. *Bodine* and *The Elizabeth Daily Journal* v. *Burkhardt,* 49 N. J. 406 (1967). In that decision the Court ordered certain of the constitutionally established whole county Senate districts to be reconstituted and directed that General Assemblymen be apportioned to the Senate Districts according to the method of equal proportions rather than on the "two to one" basis embodied in the constitutional amendment. In addition, the Court directed the Apportionment Commission to convene prior to the 1969 general election, review all of the General Assembly districts (Senatorial elections in New Jersey are held every four years and thus none was scheduled until 1971) and make a seasonable recertification thereof. See *Jackman* v. *Bodine,* 50 N. J. 127 (1967).

In March 1969 the Apportionment Commission, uncertain as to the precise standards it was expected to apply in recertifying Assembly districts in accordance with the New Jersey Supreme Court's direction, petitioned for instructions. Although the Court eventually dismissed the petition without written opinion it directed the Commission to file its certified plan with the Court as well as the Secretary of State, and gave leave to any person to file objections thereto and be heard.

On April 7, 1969, the Commission certified its General Assembly plan to the Secretary of State and filed a copy with the Court. Several objections against all or parts of the plan were soon filed. Petitioners herein were among the objectors. On April 21, 1969, the New Jersey Supreme Court heard argument on these objections and the following day delivered its decision rejecting all of them. However, noting the substantial state and federal constitutional issues involved, the Court *expressly retained jurisdiction over the cause and declared*

its intention to schedule full argument for the Fall of 1969. Said the Court:

> "We do, however, have considerable doubt as to whether the basic plan of apportionment in our State Constitution is compatible with Federal Constitutional requirements as to either the Senate or Assembly. Specifically, we doubt that further apportionments can be made without exceeding permissible tolerances from mathematical equality. *It may therefore, be necessary to depart from the State Constitution's insistence that county and municipal lines be respected. It is perfectly clear that if reapportionment for the State legislative purposes had to be redone without reference to such lines, the practical problems would preclude the scheduled primary election and perhaps also, a general election this year.* We have in mind not only the time period which said reapportionment would entail but also the impact of such reapportionment upon the detailed election machinery. *The scheduled election to the Assembly will be the last before the new census and there will be no election to the Senate prior to that event. Mindful of the need to continue orderly government, we are constrained to conclude that the broad constitutional issue to which we have just referred should not be entertained at this time. We will however schedule the subject for full argument this fall, to the end that the matter may be settled, if possible, well in advance of the 1971 election."* *Jackman* v. *Bodine*, 53 N. J. 585, 588-589. (Emphasis added.)

Thereafter, petitioners herein applied to this Court for a stay of the scheduled June 3, 1969, primary election and for other relief. The application was denied. R. App. p. 1a.

Consistent with its announced intention to call for further argument touching upon the full range of constitutional issues involved in *Jackman* v. *Bodine,* the New Jersey Supreme Court has served notice on all the parties, including petitioners herein, that it would entertain applications to intervene until June 15, 1969, expect briefs to be filed by August 15, 1969, and had set the matter down for oral argument on September 22, 1969. The briefs and oral argument said the Court:

> ". . . shall deal with all questions, including the question whether it is possible to adhere to the following lines without creating intolerable deviation from the one man-one vote concept: (1) county lines, (2) municipal lines, (3) ward lines and (4) election district lines. * * *" R. App. p. 2a.

ARGUMENT

POINT I

Since the Supreme Court of New Jersey, in the very opinion which petitioners herein seek to have reviewed, expressly retained jurisdiction in the cause and subsequently implemented its announced intention to schedule full argument on all constitutional questions in the Fall, there exists no final judgment below and the Court therefore lacks jurisdiction pursuant to 28 U.S.C. ¶1257(3) to entertain the petition.

Nowhere in the argument portion of their petition for the issuance of a writ of *certiorari* to the New Jersey Supreme Court do petitioners discuss the most crucial aspect of that Court's latest opinion. Entirely ignored is the fact that the New Jersey Supreme Court frankly rec-

ognized the actual and potential defects arising from our State Constitution's insistence upon adherence to political subdivision boundary lines and expressly observed that: ". . . we doubt that further apportionments can be made without exceeding permissible tolerances from mathematical equality." *Jackman* v. *Bodine,* 53 N. J. 585, 588. Indeed, said the Court, "It may, therefore, be necessary to depart from the State Constitution's insistence that county and municipal lines be respected." *Id.* Consequently, no final judgment has been rendered by the New Jersey Supreme Court from which a petition for writ of *certiorari* would lie pursuant to 28 U. S. C. 1257(3). To the contrary, jurisdiction has been specifically retained and all counsel informed that full argument on all of the constitutional questions involved will be heard in September 1969. R. App. p. 2a.

The opinion of the Supreme Court of New Jersey specifically dealt with petitioners' contention that adherence to political subdivision boundary lines in *state* districting and apportionment must no longer be tolerated if they give rise to correctable population deviations. The Court preliminarily concluded that the two recent *congressional* districting cases, *Kirkpatrick* v. *Preisler,* —— U. S. ——, 89 S. Ct. 1225, 22 L. Ed. 2d 519 (1969) and *Wells* v. *Rockefeller,* —— U. S. ——, 89 S. Ct. 1234, 22 L. Ed. 2d 535 (1969) did not appear at this stage to require such a meaningful departure in the *state* districting context. *Jackman* v. *Bodine, supra,* 53 N. J. 585 at 588.

Interestingly, the decisions of this Court in *Kirkpatrick* v. *Preisler, supra,* and *Wells* v. *Rockefeller, supra,* were delivered on April 7, 1969, the same day the New Jersey Apportionment Commission[4] certified to Secretary of

[4] Petitioners refer to this body as the "Reapportionment Commission". Its correct designation is the "Apportionment Commission".

State Burkhardt the plan of apportionment for the New Jersey General Assembly which petitioners now impugn. Thus, the impact of the *Wells* and *Kirkpatrick* decisions on *congressional* districting were just beginning to be absorbed at the time the New Jersey Supreme Court was called upon to consider the objections to the Apportionment Commission's certified plan. As noted, petitioners herein specifically briefed and argued the impact of *Wells* and *Kirkpatrick* on *state* legislative apportionment, and the New Jersey Supreme Court's decision was undoubtedly the earliest pronouncement by the highest court of any state relative to that question. However, it must be borne in mind that the critical need for a speedy resolution by the Court of the objections presented to it necessitated a drastically curtailed appeal procedure with respect to preparation of briefs and time to prepare for oral argument. Ordinarily, appellants have 30 days within which to file briefs and respondents have 30 days within which to reply. See R.R. 1:7-12. The matter is then scheduled for oral argument some months later. The exigencies of time prohibited use of the ordinary procedure in this case for many reasons. For example, if New Jersey's primary election timetable was to proceed in accordance with the mandate of statutory law, the candidates for General Assembly had only until April 24, 1969, forty days next preceding the date of the primary election, to file their nominating petitions. See N.J.S.A. 19:23-14.

Accordingly, although it gave serious consideration to the *Wells* and *Kirkpatrick* cases, the Court had to be particularly mindful of the time schedule inexorably bearing down upon it. Even though rejecting the argument based upon *Wells* and *Kirkpatrick*, the Court took particular pains to observe that a decision requiring total abandon-

ment of adherence to political subdivision boundaries would, at such a late hour, be potentially disasterous to the orderly conduct of state government. With the primary election scheduled for June, and a general election for November, a decision in April requiring a total revampment of General Assembly districts based upon population *alone* without regard to political subdivision lines would be unthinkable. Such a decision would have automatically foreclosed a June primary and might very well have resulted in *no* election at all in New Jersey in 1969, *primary or general.* See *Reynolds* v. *Sims, supra,* 377 U. S. 533 at p. 585.

Furthermore, there was perhaps a more compelling reason for the Court below not to immediately and finally decide the ramifications of the *Wells* and *Kirkpatrick* issue. The 1969 primary and general elections for candidates for the New Jersey General Assembly were to be the last such elections prior to promulgation of the 1970 federal census figures. Thus, the particular plan of General Assembly apportionment to be used in 1969, indeed *any* plan of apportionment for 1969, by its very nature was only *temporary.* The 15 Senate districts within which the Apportionment Commission established the existing General Assembly subdistricts were based upon 1960 census data. Due to population shifts, entirely new Senate districts are to be established by the Commission in 1971 pursuant to state constitutional mandate. See Art. IV, Sec. III, par. 1, N. J. Const., 1947, as amended. Thus, with a nearly two year hiatus until the next certification of legislative districts, both Senate and General Assembly, the New Jersey Supreme Court felt, and properly so, that ample time existed for a full and detailed exploration of the basic issue of whether and to what extent, if at all, the present districting and apportionment pro-

visions of the New Jersey Constitution could be tolerated under the Federal Constitution. And, as noted *supra*, the Court has served notice upon all the participants in the *Jackman* v. *Bodine* proceeding, including petitioners, that the Court expects to receive briefs by August 15, 1969, and will hear oral argument on September 22, 1969, upon this and all other relevant constitutional questions.

Clearly then, there exists no final judgment below. The constitutional issues presented by petitioners herein are still pending a full and final determination by the New Jersey Supreme Court and a prior adjudication in that latter state forum, which might well be favorable to petitioners and thereby obviate any need for their seeking further relief, must first be obtained. See, *e.g., Republic Natural Gas Co.* v. *Oklahoma*, 334 U. S. 62 (1948); *Richfield Oil Corp.* v. *State Board of Eq.*, 329 U. S. 69 (1946); *Radio Station WOW, Inc.* v. *Johnson*, 326 U. S. 120 (1945); *cf. Cardinale* v. *Louisiana*, —— U. S. ——, 22 L. Ed. 2d 398, 89 S. Ct. 1162 (1969).

Accordingly, since no further state election will be conducted until 1971 petitioners can suffer no possible harm while the Supreme Court of New Jersey is fully considering and deciding the matter. Under the circumstances the contention raised by petitioners respecting New Jersey's state constitutional requirement that Senate and General Assembly districts honor political subdivision boundaries must and should first be fully heard in the New Jersey Supreme Court, the forum where it is presently pending. A grant of *certiorari* now, before the matter has been fully and finally adjudicated by the state court, would be singularly inappropriate.

The foregoing discussion *vis-a-vis* petitioners' Point I applies with equal force to their Point II respecting a

charge of a violation of the Fifteenth Amendment. Other than making unsubstantiated allegations based upon a vague generalized affidavit, there is not, nor has there ever been, a competent record established upon which serious consideration and deliberation of this issue could intelligently proceed. *Cf. Ellis* v. *Dixon,* 349 U. S. 458 (1955); *Rescue Army* v. *Municipal Court,* 331 U. S. 549 (1947). Further, as observed *supra,* the 1969 *election will in any event proceed upon the districts challenged by petitioners.* By 1971 entirely new districts will have been established by the Apportionment Commission under guidelines emanating from a decision in the pending state court proceeding. It may well be that after the state court fully adjudicates the matter, or after new districts are certified, petitioners may find that they have nothing about which to complain.

CONCLUSION

Since the Supreme Court of the State of New Jersey has not fully and finally adjudicated the issues presented in the Petition for Writ of Certiorari, and the state Court has scheduled full argument thereon for September 1969, the petition is palpably premature and should be denied.

Respectfully submitted,

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STEPHEN G. WEISS,
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Of Counsel and On the Brief.

APPENDIX

Letter of May 26, 1969, from Clerk of the Supreme Court of the United States

OFFICE OF THE CLERK
SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C., 20543

May 26, 1969

Re: *Jackman, et al.* v. *Bodine, et al.*,
No. 1421, Oct. Term, 1968

Dear Sir:

The Court today entered the following order in the above-entitled case:

> The application for a stay of the primary election of June 3, 1969, and for other relief, is denied. Mr. Justice Brennan took no part in the consideration or decision of this application.

Very truly yours,

JOHN F. DAVIS, Clerk
By: C. T. LYDDEN
Assistant

Hon. Arthur J. Sills
Attorney General of New Jersey
State House Annex
Trenton, N. J. 08625

Letter of May 14, 1969, from Clerk of the Supreme Court of New Jersey

OFFICE OF THE CLERK
SUPREME COURT OF NEW JERSEY
STATE HOUSE ANNEX
TRENTON, N. J.

JOHN H. GILDEA
CLERK

May 14, 1969

TO COUNSEL IN THE REAPPORTIONMENT CASES

These cases have been set down for further argument on Monday, September 22, 1969, with respect to the constitutionality of the provisions of our State Constitution respecting apportionment.

All briefs shall be filed by August 15th and shall deal with all questions, including the question whether it is possible to adhere to the following lines without creating intolerable deviation from the one man-one vote concept: (1) county lines, (2) municipal lines, (3) ward lines and (4) election district lines. Applications to intervene shall be filed with the Court not later than June 15, 1969.

JOHN H. GILDEA